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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7  
8 DAVID MOORE,  
9 Plaintiff,  
10 v.  
11 GILEAD SCIENCES, INC.,  
12 Defendant.

No. C 07-03850 SI

**ORDER RE: DEFENDANT'S MOTION  
FOR PROTECTIVE ORDER; NON-  
PARTY'S MOTION TO QUASH; AND  
OUTSTANDING DISCOVERY ISSUES**

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14 On September 29, 2011, Gilead Sciences, Inc. ("Gilead") filed a motion for a protective order.  
15 The hearing for that motion was held on October 28, 2011. For the reasons set forth below, the Court  
16 hereby GRANTS IN PART and DENIES IN PART defendant's motion for a protective order.

17 On October 15, 2011, a nonparty to this action filed a motion to quash a subpoena seeking his  
18 deposition testimony and the production of documents. Pursuant to Civil Local Rule 7-1(b), the Court  
19 finds this matter appropriate for resolution without oral argument and hereby VACATES the November  
20 18, 2011 hearing. The Court DENIES nonparty's motion to quash the subpoena.

21 The parties have also filed a Joint Statement on Outstanding Discovery Issues seeking the  
22 Court's resolution of their discovery disputes. The Court rules on these issues concurrently with the two  
23 motions.

24

25 **BACKGROUND**

26 From 2003 to 2008, Gilead, a corporation that develops and markets pharmaceutical drugs,  
27 employed plaintiff Moore as a Therapeutic Specialist, Gilead's term for a sales representative. Pl.'s  
28 Fourth Amended Compl. ("FAC") at ¶ 8. As a sales representative, Moore marketed HIV drugs in the

1 Brooklyn, New York area. *Id.* On November 15, 2006, Moore sued Gilead under the *qui tam* provisions  
2 of the False Claims Act, alleging that Gilead was paying physicians to induce them to prescribe Gilead's  
3 HIV/AIDS medication. *Id.* at ¶ 14. On March 26, 2008, Moore took a medical leave of absence,  
4 alleging anxiety and insomnia problems resulting from the filing of the *qui tam* action. *Id.* at ¶ 19. In  
5 August 2008, while Moore was on this medical leave, the Government provided Gilead with the *qui tam*  
6 complaint, disclosing Moore as the *qui tam* plaintiff. *Id.* at ¶ 24. That same month, Moore tried to  
7 return to work as a Therapeutic Specialist, but Gilead told him that he could not and would have to  
8 re-apply again. After interviewing him for his old position, Gilead declined to re-hire Moore and  
9 formally separated Moore from the company in October 2008. *Id.* at ¶ 38.

10 Moore alleges that Gilead illegally discharged him in retaliation after discovering that Moore  
11 had filed the *qui tam* action against it. *Id.* at ¶ 40. Moore claims that Gilead wrongfully discharged him  
12 in violation of the Federal False Claims Act, 31 U.S.C. § 3730(h) (Count I); New York Labor Law §  
13 740 (Count II); New York False Claims Act, New York Finance Law § 191 (Count III); and New York  
14 State Human Rights Law and New York City Human Rights Ordinance (Count IV).

15 On August 1, 2011 Gilead filed a motion for sanctions requesting monetary damages and  
16 dismissal of this action based upon Moore's alleged spoliation of evidence. Doc. 78. In its motion,  
17 Gilead claims that from 2006 through 2008, Moore intentionally destroyed over 10,000 relevant  
18 documents, correspondence, electronic mail, and other pieces of evidence by wiping data from the hard  
19 drive of his company-issued laptop. *Id.* Gilead argues that this deleted evidence was critical to its  
20 defense in both the dismissed *qui tam* action as well as Moore's retaliation action. *Id.*

21 Following Gilead's motion for sanctions, Moore issued new discovery requests that he believes  
22 are relevant to his opposition to the motion for sanctions. In response, Gilead filed a motion for a  
23 protective order concerning the documents that Moore seeks in his fourth request for production of  
24 documents.

25 In addition, nonparty Dr. Joseph Exilhomme has filed a motion to quash Moore's subpoena  
26 seeking Dr. Exilhomme's deposition and the production of documents. Dr. Exilhomme seeks to invoke  
27 his Fifth Amendment privilege, asserting that Moore has accused him of engaging in criminal conduct  
28 and that he has been threatened with prosecution based upon the matters contained in the Fourth

1 Amended Complaint. In his opposition to the motion to quash, Moore moved for costs incurred in  
2 responding to Dr. Exhilhomme's motion, arguing that Dr. Exhilhomme's position is "unsupported and  
3 unsupportable." Pl.'s Opp to Mot. to Quash at 1.

4 Finally, the parties also request the Court's aid in various discovery disputes.  
5

## 6 **LEGAL STANDARDS**

### 7 **I. Protective Order**

8 Under Fed R. Civ. Proc. 26(c), a party may file a motion for a protective order, and the Court  
9 may "issue an order to protect a . . . person from . . . undue burden," including an order "forbidding the  
10 disclosure or discovery," "specifying the terms, including time and place, for the disclosure or  
11 discovery," "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to  
12 certain matters," or "requiring that a trade secret or other confidential research, development, or  
13 commercial information not be revealed or be revealed only in a specified way." Fed. R. Civ. P. 26(c).  
14 The Supreme Court has interpreted Rule 26(c) as conferring "broad discretion on the trial court to  
15 decide when a protective order is appropriate and what degree of protection is required." *Seattle Times*  
16 *Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

### 17 **II. Motion to Quash Relying on the Fifth Amendment Privilege**

18 Under Federal Rule of Civil Procedure 45(a)(1)(c), any party may serve a subpoena commanding  
19 a nonparty "to produce documents, electronically stored information, or tangible things . . ." Fed. R.  
20 Civ. P. 45(a)(1)(C). The subpoena is subject to the relevance requirements set forth in Rule 26(b).  
21 Thus, the subpoena may command the production of documents which are "not privileged" and are  
22 "relevant to any party's claim or defense" or "reasonably calculated to lead to the discovery of  
23 admissible evidence." Fed. R. Civ. P. 26(b)(1). Upon a timely motion, the court issuing such a  
24 subpoena shall quash it if it determines that the subpoena "requires disclosure of privileged or other  
25 protected matter, if no exception or waiver applies." Fed. R. Civ. P. 45(c)(3)(A)(iii).

26 "The Fifth Amendment 'can be asserted in any proceeding, civil or criminal, administrative or  
27 judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness

1 reasonably believes could be used in a criminal prosecution or could lead to other evidence that might  
2 be so used.”” *United States v. Bodwell*, 66 F.3d 1000, 1001 (9th Cir. 1995) (per curiam) (quoting  
3 *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972)). “The propriety of invoking the Fifth  
4 Amendment privilege depends on whether the risk of prosecution is substantial and real and not merely  
5 fanciful.” *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 883 (D.C. Cir. 1981).

6

## 7 DISCUSSION

### 8 **I. Gilead’s Motion for a Protective Order**

#### 9 **A. Documents and 30(b)(6) Deposition Topics Requested**

10 In his fourth request for production of documents and notice of depositions, Moore seeks various  
11 discovery items from Gilead including: (1) information and documents regarding data from Moore’s  
12 work computer from 2007 to 2008; (2) emails in Gilead’s possession pertaining to Moore; (3) any and  
13 all documents that Gilead contends Moore improperly destroyed; (4) information and documents  
14 pertaining to Gilead’s inspections of its employees’ computers and Gilead’s computer use policies; (5)  
15 information and documents relating to when and how Gilead discovered Moore’s wiping activities; (6)  
16 information and documents pertaining to the Department of Justice’s investigation of Gilead in the *qui*  
17 *tam* action.

18 Though the parties have come to an agreement regarding some of the requests, Gilead seeks a  
19 protective order on the following:

- 20 1. Document requests numbered: 125, 126, 127, 133, 136, 137, 146, 147, and 150;
- 21 • **125:** The inspection of the mirror image taken from plaintiff’s laptop computer  
in January 2007 including the complete copying of any electronically stored  
information from this mirror image.
- 22 • **126:** The inspection of the computer hard drive taken from plaintiff’s laptop  
computer in January 2008 including the complete copying of any electronically  
stored information from this hard drive.
- 23 • **127:** The inspection of the computer hard drive returned by plaintiff to defendant  
following plaintiff’s termination including the complete copying of any  
electronically stored information from this hard drive.
- 24 • **133:** Any and all emails archived by defendant that plaintiff sent or received in  
any form including back up systems used for emergency preparedness.
- 25 • **136:** Any and all documents relating or pertaining to any computer inspections  
performed by a third party vendor as to any computer hard drive or mirror image  
of any current or former employee of Gilead’s from 2005 to the present.
- 26 • **137:** Any and all documents relating or pertaining to any computer inspections  
performed by a third party vendor as to any computer hard drive or mirror image

of any current or former employee of Gilead's other than plaintiff from 2005 to the present.

- **146:** Any and all documents obtained by defendant from its sales representatives related to any legal hold that defendant contends plaintiff violated.
  - **147:** Any and all documents turned over to the U.S. Dept. of Justice by defendant as a result of any subpoena received for which a legal hold was issued by defendant that defendant contends plaintiff violated.
  - **150:** Any and all documents defendant received from the U.S. Dept. of Justice regarding the legal hold that defendant contends plaintiff violated.

2. 30(b)(6) topics numbered: 7, 8, 12, 14, 15, 16, 17, and 18.

- **7:** The facts and circumstances of any and all documents obtained by defendant from its sales representatives related to any legal hold that defendant contends plaintiff violated.
  - **8:** The facts and circumstances of any and all documents turned over to the U.S. Dept. of Justice by defendant as a result of any subpoena received for which a legal hold was issued by defendant that defendant contends plaintiff violated.
  - **12:** The availability by any other method of any documents that defendant contends that plaintiff spoliated.
  - **14:** The facts and circumstances of defendant's computer use policy in place that was signed and allegedly agreed to by plaintiff.
  - **15:** The facts and circumstances of defendant's IT Acceptable Use Policy in place that was signed and agreed to by plaintiff.
  - **16:** The facts and circumstances concerning plaintiff's notice of defendant's legal hold that defendant contends that plaintiff violated.
  - **17:** The facts and circumstances concerning how defendant first obtained any information about possible wiping activities by plaintiff, when this information was obtained, and what was done in response.
  - **18:** The motivations, facts, and circumstances of defendant in conducting extensive computer forensic activities involving any computer hard drive, mirror image of a computer hard drive, or any electronically stored information of plaintiff's.

The Court's rulings on these issues follow.

**B. Emails on Defendant's Back-Up Recovery System (Document Request No. 133)**

Moore seeks all emails archived by Gilead, sent or received by Moore, in any form, including Gilead's back-up systems for emergency preparedness.

Gilead objects to Moore's requests as burdensome, because accessing the emails from the back-up system would require Gilead to index its wholesale back-up tapes, process the restored data, and conduct a review for the responsive documents. Gilead contends that the cost to index the tapes alone is \$360,000. This high cost is due to the fact that Gilead's back-up system is meant to ensure against the loss of the company's entire data network, not to provide recovery of discrete documents. Gilead further contends this cost is unnecessary given that it has already produced 25,000 pages of emails sent

1 or received by Moore. Further, Gilead speculates the back-up system may not have many of Moore's  
2 documents. This is because the system backs up data once a month, and if Moore created and destroyed  
3 documents in between these one-month intervals, these documents would not have entered the back-up  
4 system.

5 Moore contends that he should not be refused discovery just because Gilead's only back-up  
6 system does not easily recover specific documents. Further, Moore agrees to share in the burden of the  
7 costs by inspecting the tapes, copying the tapes and retrieving the emails at his own expense as long as  
8 Gilead make these back-up tapes available.

9 The low probative value of these documents does not justify the high cost and effort of obtaining  
10 them. Moore's proffered solution to the high cost of recovering these documents is not workable as it  
11 would allow him access to the entirety of Gilead's data and proprietary information for the period of  
12 several years. Unless Moore agrees to bear the \$360,000 cost, the Court GRANTS Gilead's motion for  
13 a protective order.

14

15 **C. Documents Regarding the DOJ's Investigations (Document Request Nos. 146, 147,  
16 150; Deposition Topics No. 7 and 8)**

17 The second category of documents requested by Moore are documents that Gilead sent to and  
18 received from the DOJ regarding the legal hold that the Gilead contends Moore violated.

19 Gilead argues that these documents are irrelevant to the motion for sanctions concerning  
20 Moore's wiping activities because they pertain to the unrelated *qui tam* action. Gilead also contends  
21 that these documents may contain privileged attorney-client information or attorney work-product.

22 Moore disputes Gilead's contention of irrelevancy by stating that he will use these documents  
23 to prove that none of the documents Moore allegedly destroyed were relevant to the DOJ investigation  
24 or legal hold. Moore also argues that privilege is not an issue here given that a third party, the DOJ, was  
25 involved in the handling of these documents.

26 The Court GRANTS defendant's motion for a protective order with regard to these documents  
27 and deposition topics. The burden is on Gilead to prove that any documents Moore destroyed pertained  
28 to the DOJ investigation. Therefore, Gilead, not Moore, will have to produce any DOJ-related

1 documents to support its claim of spoliation.  
2

3 **D. Documents Regarding Gilead's Discovery of Moore's Wiping Activities and  
4 Gilead's Computer Use Policy (Document Request Nos. 136, 137; Deposition Topics  
12, 14-18)**

5 Moore also seeks discovery regarding how and when Gilead discovered his wiping activities,  
6 whether Gilead monitored any other employees' computers for these activities, and Gilead's use policy  
7 regarding computers and technology.

8 Gilead argues that Moore already has the information he seeks through his 30(b)(6) deposition  
9 of Vicki Clewes, Associate Director and head of the Records and Information Management group at  
10 Gilead. Def.'s Mot. for Prot. Order at 4. One of the topics of this deposition was to inquire into "the  
11 back-up of Mr. Moore's hard drive by Gilead." Ms. Clewes testified as to when and how Gilead learned  
12 of Moore's wiping activities. She also testified to Gilead's access to Moore's emails, Gilead's computer  
13 use policy, and the legal holds that Moore allegedly violated. Any more detailed information, Gilead  
14 contends, would require her and Gilead to disclose confidential attorney-client communication.  
15 Furthermore, Gilead argues that this information is irrelevant to the Motion for Sanctions.

16 Moore urges the Court to allow Gilead to assert its privilege as to specific questions and  
17 documents, rather than dismissing an entire category of documents and topics as privileged. Moore  
18 contends that the deposition topics that he requests now were not covered in Ms. Clewes' deposition  
19 testimony, including topics numbered 14 and 16 (whether Moore agreed to Gilead's computer use policy  
20 and whether Moore was notified of Gilead's legal hold). As to relevancy, Moore claims that if Gilead  
21 knew about Moore's wiping activities while he was employed and did nothing to stop them, Gilead is  
22 estopped from claiming that the spoliation harmed its litigation position. Moore also contends that this  
23 information is potentially relevant to his retaliation claim if Gilead conducted forensic examination on  
24 only his computer and not any other employee's.

25 The deposition of Ms. Clewes did not cover the entirety of Moore's requested topics and thus  
26 the Court DENIES Gilead's motion for protective order on these deposition topics and will allow Moore  
27 to take another two hour deposition of Vicki Clewes. The Court GRANTS Gilead's motion with regard  
28 to the documents here - requests 136 and 137.

1                   **E.       Contents of the Hard Drives at Issue (Document Request Nos. 125-27)**

2                   Moore also requests to (1) inspect the hard drives of his work-issued computer and (2) obtain  
3                   all of the data and information from these hard drives.

4                   Gilead agrees that it will permit Moore's forensic expert to inspect Moore's hard drive to  
5                   evaluate any spoliation activities. However, Gilead opposes Moore's request to collect all of the  
6                   information stored on those computers, given that Gilead has already produced the non-privileged  
7                   relevant documents from this hard drive. To allow Moore to inspect these hard drives without limits,  
8                   Gilead contends, would be to allow Moore to go on a "fishing expedition."

9                   Moore argues that he has a right to the information on these hard drives because he used these  
10                  computers in the course and scope of his employment at Gilead. Thus, he contends, there should be no  
11                  restrictions on the data that he can access on these hard drives.

12                  The information on these hard drives will likely lead to relevant evidence regarding the motion  
13                  for sanctions or to Moore's retaliation claim. Gilead has not proffered any persuasive reason to preclude  
14                  Moore from accessing information on a computer that he used while employed by Gilead. Therefore,  
15                  the Court DENIES Gilead's motion for protective order with regards to the information requested here.

16                  In sum, the Court hereby GRANTS defendant's motion for protective order with respect to  
17                  Document Requests No. 133, 136, 137, 146, 147, 150 and deposition topics No. 7 and 8 and DENIES  
18                  defendant's motion for protective order with respect to Document Requests No. 125-27 and deposition  
19                  topics No. 12 and 14-18.

20  
21                   **II.      The Non-Party Motion to Quash**

22                  Nonparty Dr. Joseph Exilhomme moves to quash Moore's subpoena seeking Exilhomme's  
23                  deposition testimony and the production of documents. Exilhomme asserts his Fifth Amendment  
24                  privilege against self-incrimination by alleging that some of the materials and testimony sought are  
25                  likely to be incriminating, given Moore's assertion that Exilhomme was a participant in the alleged  
26                  kickback scheme wherein Exilhomme took exorbitant "speaker fees" in return for prescribing Gilead's  
27                  medicine. FAC at ¶¶ 14T, 14X. Furthermore, Exilhomme argues, the risk of prosecution here is not

1 fanciful, especially in light of the assistant U.S. Attorney's threat to institute an action against  
2 Exilhomme for his alleged conduct. Rosenberg Decl. at ¶ 13; see *In re Master Key Litig.*, 507 F.2d 292,  
3 293 (9th Cir. 1974) ("[T]he right to assert one's privilege against self-incrimination does not depend  
4 upon the likelihood, but upon the possibility of prosecution.").

5 However, Exilhomme cannot make a blanket invocation of the Fifth Amendment privilege. The  
6 proper procedure requires the party seeking the protection of the Fifth Amendment to raise the privilege  
7 with "respect to a specific question" so that the court can determine whether "a responsive answer might  
8 lead to injurious disclosures." *United States v. Drollinger*, 80 F.3d 389, 392 (9th Cir. 1996); *United*  
9 *States v. Bodwell*, 66 F.3d 1000, 1001 (9th Cir. 1995) ("the only way the Fifth Amendment can be  
10 asserted as to testimony is on a question-by-question basis."). Therefore, Exilhomme must attend his  
11 deposition and assert his privilege with respect to specific questions; he is not entitled to "voice a  
12 blanket refusal to produce his records or testify." *SEC v. First Financial Group of Texas, Inc.*, 659 F.2d  
13 660, 668 (5th Cir. 1981).

14 Exilhomme also asserts a blanket invocation of his Fifth Amendment privilege with regards to  
15 the document production request. A person may only refuse to produce documents on the basis of the  
16 Fifth Amendment privilege against self-incrimination if the act of producing the documents has an  
17 incriminating aspect. *United States v. Hubbell*, 530 U.S. 27, 36 (2000). The act of production may  
18 implicitly communicate "statements of facts" by compelling the person "to admit that the papers existed,  
19 were in his possession or control, and were authentic." *Id.* (citing *United States v. Doe*, 465 U.S. 605,  
20 613 n. 11 (1984)). However, if the documents themselves contain incriminating assertions of fact or  
21 belief, the Fifth Amendment does not apply because "the creation of those documents was not  
22 compelled." *Id.*

23 Here, Exilhomme has not explained how producing the documents requested by Moore would  
24 be an act of self-incrimination. Exilhomme cited an inapposite Second Circuit case in his motion to  
25 quash. There, the Second Circuit did not analyze the issue of whether the act of producing the requested  
26 documents constituted self-incrimination but rather whether the parties had waived their right to assert  
27 the Fifth Amendment privilege. *In re DG Acquisition Corp.*, 151 F.3d 75, 80 (2nd Cir. 1998).

28 The Court finds more instructive *Hubbell* and *Wyler*. In *Hubbell*, the defendant entered a plea

1 agreement in which he agreed to furnish the government with “full, complete, accurate, and truthful  
2 information” about matters relating to an investigation. *United States v. Hubbell*, 530 U.S. at 30. The  
3 government later launched a second investigation to determine whether the defendant was complying  
4 with this agreement. *Id.* It sought from defendant production of documents relating to matters in the  
5 first investigation. *Id.* Thus, that defendant would produce any documents could indicate that he did  
6 not comply fully with his plea agreement and therefore would be an act of self-incrimination. This is  
7 simply not the case here.

8 Rather, the Court finds that the circumstances here are more analogous to those in *Bear Sterns*  
9 & Co. v. Wyler, 182 F. Supp. 2d 679 (N.D. Ill. 2002). In that breach of fiduciary duty case, the  
10 defendant sought to avoid production of documents by asserting his Fifth Amendment privilege, where  
11 the plaintiff requested records pertaining to defendant’s three investment firms, defendant’s wire  
12 transfers, and his phone records. *Id.* at 680. The court found that the Fifth Amendment privilege did  
13 not protect against producing the documents, reasoning that it was not a crime to make a wire transfer,  
14 use the phone, or possess corporate records. *Id.* at 684. It appeared that the defendant there wanted to  
15 protect the incriminating content of the documents, which is not covered under the Fifth Amendment  
16 privilege against self-incrimination. *Id.* at 684; *see Hubbell*, 530 U.S. at 36.

17 Likewise, it is not a crime to possess the documents requested by Moore, such as those  
18 pertaining to Gilead’s speaker programs and payments. Exilhomme’s Fifth Amendment privilege does  
19 not protect him from producing documents in which the contents may be incriminating, but the act of  
20 producing them is not. The motion to quash is DENIED. Moore’s request for costs incurred in  
21 responding to this motion is also DENIED.

22

23 **III. Outstanding Discovery Issues**

24 The parties filed a joint motion regarding outstanding discovery issues seeking the Court’s  
25 resolution to the issues below.

26

27 **A. Moores’s Request for Documents, Set One**

28 Moore and Gilead dispute the relevance of Requests Nos. 56-59, 61-64, and 84-85. These are

1 requests for documents related to the dismissed *qui tam* action. They request documents (1) that relate  
2 to Gilead's payments to doctors for speaking or attending meetings; (2) that Gilead provided to Moore  
3 relating to the promotion of any of Gilead's drugs since 2005 and meetings Moore attended regarding  
4 the promotion of these drugs; and (3) that relate to any complaint of retaliation or violation anti-  
5 kickback laws. Moore argues that Gilead has provided inadequate responses and refused to produce  
6 documents for these requests. Gilead contends that these requests are overly broad, burdensome and  
7 would not lead to any relevant information.

8 These documents will likely lead to relevant evidence regarding Moore's retaliation claim and  
9 Gilead is therefore ordered to provide them to Moore.

10

11       **B. 30(b)(6) Deposition Topics**

12       In contention are deposition topics 10 and 11 for which Gilead has refused to produce a witness.  
13 These topics ask for witnesses with knowledge of the documents and "contents of any documents" that  
14 Gilead alleges Moore spoliated. Gilead objects to these topics because Gilead is unable to determine  
15 which documents Moore destroyed. Gilead has supplied Moore with a forensic report which identified  
16 the file names of certain destroyed documents, to the extent recoverable. However, Gilead claims it has  
17 no other way of knowing what was destroyed.

18       Moore has more knowledge regarding any documents he deleted from his computer than Gilead.  
19 Gilead has already provided Moore with a list of destroyed documents. Because Gilead has no other  
20 way of knowing what documents Moore destroyed, Gilead is not ordered to produce a witness for  
21 deposition topics 10 and 11.

22

23       **C. Moore's Request for Documents, Set Four**

24           **1. Information Relating to How Gilead Obtained Produced Emails**

25       Regarding Request Nos. 129 and 130, Gilead has produced the emails requested. However,  
26 Moore requests information as to how Gilead obtained these emails, such as whether the emails were  
27 archived by Moore or other persons.

28       Gilead is ordered to provide this information as it may lead to relevant information pertaining

1 to Moore's retaliation claim.

2

3 **2. Documents Pertaining to Alleged Spoliation Activities**

4 Regarding Request Nos. 131 and 132, Moore requests emails Gilead believes he should have  
5 retained, and any emails Gilead archived that it contends Moore spoliated. Gilead objects to this request  
6 because it is unable to determine which emails Moore spoliated; nor does it have a comprehensive way  
7 of identifying emails that Moore should have retained, as it cannot identify emails received by Moore  
8 from outside senders.

9 Similarly, Request Nos. 134 and 135 ask Gilead for documents that it contends Moore spoliated  
10 but that Gilead has been able to archive or obtain from other sources. Gilead objects on the grounds that  
11 it does not know which documents Moore spoliated and therefore would not be able to identify identical  
12 documents in its system.

13 Request Nos. 148 and 149 seek other documents related to Moore's alleged spoliation of  
14 evidence: (1) documents related to "when and how" Gilead contends Moore spoliated evidence and (2)  
15 documents "related to any document" Gilead contends Moore spoliated. Gilead contends it has already  
16 provided a forensic report listing the file names it has been able to recover of the spoliated evidence, but  
17 has no further information regarding what Moore chose to destroy and thus cannot furnish any more  
18 information with respect to those documents.

19 Because Gilead has no way of knowing what Moore chose to destroy, it cannot respond to these  
20 requests for documents. Gilead has already provided to Moore the forensic report which lists the file  
21 names it has been able to recover of the documents destroyed. Therefore, Gilead is not ordered to  
22 respond to these requests.

23

24 **3. Documents Related to Gilead's Alleged Retaliation**

25 Request Nos. 138-145 seek information regarding whether any employees suffered disciplinary  
26 action due to violations of Gilead's computer use policy, its legal hold policies or email archiving  
27 policies. Gilead contends that production would require invasion of employee privacy.

28 The Court finds that if and to the extent Gilead continues to assert that it fired Moore for

1 destruction of documents, this information is relevant to Moore's underlying retaliation claim. *See* Joint  
2 Statement on Discovery Issues at 5. To the extent that this request raises privacy concerns, Gilead can  
3 replace the employees' names with numbers or use another similar method to hide the identities of the  
4 employees.

5

6 **CONCLUSION**

7 Accordingly, the Court hereby GRANTS defendant's motion for protective order with respect  
8 to Document Requests No. 133, 137, 146, 147, 150 and deposition topics No. 7 and 8, and DENIES  
9 defendant's motion for protective order with respect to Document Requests No. 125-27 and deposition  
10 topics 12 and 14-18. The Court DENIES non-party's motion to quash and DENIES Moore's motion  
11 for costs. The Court orders defendant to produce documents responsive to Moore's Document Requests  
12 No. 56-59, 61-64, 84-85, 129, 130, 138-145. Defendant does not have to respond to Document Requests  
13 Nos. 131, 132, 134, 135, 148, 149 and deposition topics No. 10 and 11.

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**IT IS SO ORDERED.**

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17 Dated: November 16, 2011

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SUSAN ILLSTON  
United States District Judge